U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2005
WAC 05 040 54075

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as an agricultural nursery manager. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner does not qualify for classification as an alien of exceptional ability and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the petitioner is an alien of exceptional ability and that a labor certification could not have been obtained prior to the expiration of his nonimmigrant status.

While the petitioner has clearly overcome the director's statement that a labor certification could be obtained prior the expiration of the petitioner's nonimmigrant status, the "urgency" of obtaining lawful permanent resident status is not a valid basis for evaluating requests for a national interest waiver. For the reasons discussed below, however, the petitioner has not overcome the director's remaining valid concerns.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications

possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

We concur with the director's finding that the petitioner meets this criterion.

The petitioner possesses a bachelor of science in agriculture. Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. As a bachelor of science degree is not required or even recommended for nursery managers, we are satisfied that the petitioner meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner does not claim to meet this criterion.

A license to practice the profession or certification for a particular profession or occupation

The petitioner does not claim to meet this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The petitioner does not claim to meet this criterion.

Evidence of membership in professional associations

The petitioner claims for the first time on appeal to meet this criterion. He submits a facsimile copy of an undated application for membership in the American Society for Horticultural Science. The facsimile was sent July 22, 2005. The record contains no evidence that the petitioner was a member of this society as of the date of filing, November 24, 2004. As such, the membership is not evidence of the petitioner's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak;* 14 I&N Dec. 45, 49 (Comm. 1971). Regardless, the record lacks evidence that membership in the society is indicative of a degree of expertise above that ordinarily encountered.

The petitioner also relies on the California Certified Organic Farmers certification of his employer's nursery, which lists him and another individual as the managers. The certificate, however, reflects that the operation has been certified since December 12, 1990, eight years before the petitioner began working there. As such, it is not clear that the certification is indicative of the petitioner's degree of expertise above that ordinarily encountered.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The director concluded that the petitioner meets this criterion. We withdraw this conclusion. The record contains reference letters attesting to the petitioner's skills and the importance of the nursery where he works. None of the evidence, however, reflects the type of formal recognition contemplated by this criterion, such as honors, certificates of recognition or awards. Thus, the petitioner has not demonstrated that he meets this criterion.

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was a basis of the director's decision.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, agriculture, and that the proposed benefits of his work, superior crops with less pesticide use, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In evaluating this question, the director first stated the following:

> The petitioner has not established that there is any real urgency to his entry into the United States in an immigrant status. . . . In fact, the petitioner must show that by not being given immediate immigrant status the national interest of the United States would actually be harmed. The petitioner has failed to establish that such harm to the national interest would occur if his employer took the extra time to obtain a labor certification through the normal labor certification process.

The director then noted the petitioner's nonimmigrant status and concluded that the labor certification process could be completed prior to the expiration of that status.

On appeal, the petitioner submitted evidence that he has been a nonimmigrant since October 1997 and that his status expired November 4, 2004.

The "urgency" language used by the director does not reflect the proper standard set forth in *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 215. That decision does state that the national interest waiver was not intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223. This language, however, merely emphasizes that the inconvenience of the process itself is not an argument to waive the requirement. Such language does not imply that the petitioner must demonstrate that there is any "urgency" to his adjustment to lawful permanent resident status. In fact, the AAO clearly stated that the inapplicability of the labor certification process is not, in and of itself, a basis to waive that process.[1] *Id.* at 218, n. 5.

In light of the above, the fact that the petitioner has now demonstrated that the labor certification process cannot be completed before his nonimmigrant status expires does not justify the waiver. The fact that overcoming this concern does not render the petition approvable exemplifies why this office will not uphold decisions focusing solely on this "urgency" concern.

Nevertheless, on page 4 of his decision, the director adopted the proper standard. Specifically, he stated that a shortage of qualified workers in the field is an argument for obtaining the labor certification rather than waiving it. The director then accepted that the petitioner was qualified for the job, but determined that the record did not demonstrate that he would serve the national interest to a greater extent than a similarly qualified U.S. worker. For the reasons discussed below, we uphold the legal and factual bases of this finding.

The petitioner has worked for Speedling, Inc. since September 1998 as a nursery manager. Sandra Fischbein, West Coast Division Manager of Speedling, Inc., asserts that the petitioner "is the only Speedling Nursery

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[1] The director's analysis would favor aliens who file their petitions later in their stay as a nonimmigrant rather than those with superior achievements.

Manager who is capable of producing Organically Grown vegetable transplants, and capable of vegetative propagation." She further states that petitioner is "irreplaceable" and that losing him would injure Speedling's "business and the industry as a whole."

More specifically, Ms. Fischbein explains that speedlings, containerized seedlings, allow farmers to reduce labor, water and pesticides. She states that the petitioner is currently producing strawberries in this manner, previously propagated by crowns. The petitioner's nurseries produced 150 million tomato and cauliflower transplants, 15 percent of the nation's total. She credits the petitioner with developing new growing programs that save 25 to 50 percent of the time that the crops remain in the greenhouses.

Ms. Fischbein further notes the benefits of organic agriculture and asserts that the petitioner "has pioneered production of seedlings using organically approved techniques." She notes the increase in organic farming and asserts that the petitioner's two nurseries "are the handful of nurseries in California that produces [sic] organic vegetable transplants and this can account for an estimated percentage of over 50% of the organic vegetable production in the state of California."

Ms. Fischbein concludes that the containerized seedling industry is highly technical "with only a handful of capable nursery managers of which [the petitioner] is one." She contends that any available nursery manager replacing the petitioner would require three to five years of experience with Speedling, Inc. Speedling, Inc. sells its seedlings through Ag-Seeds Unlimited. The president of Ag-Seeds, Scott Sullivan, asserts that the petitioner "has consistently produced plants that are of high quality and free of diseases."

In response to the director's request for additional evidence, the petitioner submitted a letter from Arthur Greathead, an advisor to the agricultural industry in California, asserting that "the position that [the petitioner] holds is a very demanding one – and the number of persons that can adequately fill that position is very limited." Mr. Greathead then lists five areas in which someone in the petitioner's position must be skilled.

In addition, Richard Lim, President and Chief Executive Officer (CEO) of Speedling, Inc., asserts that the petitioner "developed an expertise in designing specific growing programs for each transplant, taking into account variables like water quality, greenhouse environment control, different types of weather, different types of fertilizers to use, different types of pesticides to use, types of greenhouses used, types of irrigation systems used and types of cultural practices used within each greenhouse." Mr. Lim notes that this knowledge is specific to vegetable transplant production.

On appeal, the petitioner submits information regarding the health benefits of tomatoes and the shortage of people entering the farming industry. Nita Gizdich, a past president of the Santa Cruz County Farm Bureau reiterates that the petitioner's nurseries produce a large number of tomato and cauliflower transplants and notes that the United States is experiencing a tomato shortage. The Honorable Sam Farr, a member of the U.S. House of Representatives, notes that the use of vegetable transplants reduces labor, water and pesticides.

As stated above, we do not contest the intrinsic merit of the petitioner's occupation or the national scope of agriculture. Ultimately, however, the record relies on assertions that there is a shortage of qualified nursery managers with the petitioner's unique skills and experience. *Matter of New York State Dep't. of Transp.* specifically rejects these factors as possible bases for eligibility. *Id.* at 221. The AAO asserted that unique expertise:

> would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Id. at 220-221. Furthermore, with regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand. *Id.* at 222. Ultimately, we concur with the director that the record does not establish that the petitioner's qualifications could not be listed on an application for labor certification.

We reiterate that the employer's failure to obtain a labor certification prior to the expiration of the petitioner's nonimmigrant status does not require that we waive that requirement. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.